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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 142

UNITED STATES, PETITIONER

v.

HOWARD C. MYERS

No. 143

UNITED STATES, PETITIONER

v.

JOHN H. ARBLE

No. 144

UNITED STATES, PETITIONER

v.

CHARLES C. MARTIN

No. 145

UNITED STATES, PETITIONER

v.

WALTER O. PLITZ

No. 146

UNITED STATES, PETITIONER

v.

GEORGE H. SPITZ

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to re-

view the judgments entered by the Court of Claims in the above-entitled cases on February 1, 1943.

OPINION BELOW

The opinions of the Court of Claims are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on February 1, 1943 (R. 57). A motion for a new trial was overruled on April 5, 1943 (R. 57). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, under Section 5 of the Act of February 13, 1911, as amended, the United States is required to pay customs inspectors who perform their regularly assigned tour of duty of not more than eight hours per day and 44 hours per week, not only the base pay for such tour of duty but also extra compensation at double the rate of base pay for such parts of that tour of duty as were performed on Sundays or holidays or between the hours of 5:00 p. m. and 8:00 a. m.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 21–24.

STATEMENT

Twenty-seven customs inspectors at the port of Detroit brought separate suits in the Court of Claims to recover extra compensation to which they claimed to be entitled under Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920, c. 61, 41 Stat. 402 (19[illegible] S. C. 267). The parties stipulated that the five claims here involved should serve as test cases for determination of the remaining twenty-two suits (R. 47).

Each of the five respondents was employed by petitioner as a customs inspector at the port of Detroit between September 1, 1931, and August 31, 1937. During that period, they were on duty and rendered service at eight stations at the port of Detroit—situated at ferries, tunnels, a bridge and a dock—where goods, merchandise, passengers and baggage both arrived from and entered Canada.[1] (R. 39–43.) At six of these stations, traffic was open twenty-four hours per day, and at the other two, ferries operated daily from 5 a. m. and 5:30 a. m. to 2 a. m. of the following day (R. 40–41). While each station was open, customs inspection was conducted continuously by three shifts of inspectors (R. 40–41). Their regular assigned tour

[1] The eight stations in question were the Detroit and Canada Tunnel, Ambassador Bridge, Michigan Central Tunnel, Wabash Railway Ferries, Pere Marquette Railway Ferries, Grand Trunk Railway Slip Dock, Detroit and Windsor Ferry, and Walkerville Ferry.

of duty consisted of eight hours per day and 44 hours per week,[2] and for this each inspector was paid the appropriate base salary of $2,100.00 per year (R. 39).

During the period between September 1, 1931, and August 31, 1937, some inspectors worked longer than 44 hours per week. Thus, at four stations,[3] where continuous traffic was the rule and customs service was performed 24 hours per day, the inspectors ordinarily worked 52 hours a week (R. 42). For all such services in excess of a 44-hour week, the inspectors, including respondents, were paid additional compensation at the overtime rates prescribed by Section 5 as amended in 1920 (R. 43, 44, 45, 46).[4] The extra compensation was first collected by the collector of customs from the carrier for whom the overtime services were performed and then remitted by the collector to the inspectors by check drawn against

[2] This was made up of five days of eight hours and one of four. With the enactment of the Saturday Half Holiday Law on March 3, 1931 (46 Stat. 1482, 5 U. S. C. 26a), the 48-hour week then in effect had been reduced to 44 hours and so remained during the entire period here involved (R. 42).

[3] The passenger station at the Michigan Central Tunnel, the Wabash Railway Ferries, the Pere Marquette Railway Ferries, and the Grand Trunk Railway Slip Dock, all of which operated 24 hours per day (R. 41).

[4] In some instances, services in excess of 44 hours per week were compensated by a grant of equivalent time off. No question is here raised as to the adequacy of such form of compensation.

the fund so collected." (R. 42). There is no dispute here as to the adequacy of either the base pay for the regular shift or the extra pay for the additional hours.

However, a portion of respondents' services during their regular daily eight-hour tours of duty in a 44-hour week was performed on weekdays between the hours of 5:00 p. m. and 8:00 a. m., and on Sundays or holidays. It was for the regular services so rendered that respondents sought recovery in the court below of overtime pay in addition to the base pay which they had already received. (R. 43, 44, 45, 46.) Three judges of the Court of Claims held that Section 5 of the 1911 Act as amended required that compensation at the overtime rate be paid by the United States for all services performed at night or on Sundays or

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Section 450 of the Tariff Act of 1930 requires that carriers obtain a special license from the collector of customs to unlade merchandise, baggage, and passengers from their vessels or vehicles on Sundays, holidays, and at night, and Section 451 of that Act requires that such carriers give bond "to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5" of the 1911 Act as amended (see Appendix, *infra*, pp. 21–24). A special license to unlade had been granted by the collector to the carriers here involved and a bond obtained from them in every case in which additional compensation was due and paid to the inspectors for services in excess of eight hours per day and 44 hours per week rendered at night or on Sundays and holidays, pursuant to Section 5.

holidays, even though within the regular tour of duty of eight hours daily and 44 hours weekly (R. 46, 52). The court below accordingly entered judgment in favor of each respondent for approximately double the base pay on account of such services during the period in question[6] (R. 57). The court declined to allow the Government credit for the regular base salary which had already been paid to respondents for the same services[7] (R. 52). Judge Madden dissented from that part of the decision which awarded overtime compensation to the respondents employed at the Ambassador Bridge and the Detroit and Canada Tunnel, on the ground that neither a bridge nor tunnel was a "vehicle" within the meaning of the 1944 Act as amended, nor an "agent" of the users of their facilities for the purpose of requesting the special unlading license and giving bond (R. 55–56).

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[6] The following amounts were found due to each respondent (R. 57):

Howard C. Myers	$13,759.41
John H. Arble	10,219.23
Charles C. Martin	12,225.32
Walter O. Plitz	12,277.94
George H. Spitz	10,267.68

[7] The court found that the base pay would result in the following credits, if the Government were entitled to it as a matter of law (R. 43, 44, 45, 46):

Howard C. Myers	$6,469.93
John H. Arble	4,972.76
Charles C. Martin	5,650.44
Walter O. Plitz	5,833.55
George H. Spitz	4,759.52

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that under Section 5 of the Act of February 13, 1911, as amended, work performed by customs inspectors between 5:00 p. m. and 8 a. m. or on Sunday or holidays constitutes "overtime" for the purposes of overtime rates of pay, even though such work was included in and not in excess of their regularly assigned tour of duty of not more than eight hours daily and 44 hours weekly.

(2) In holding that Section 5 of the Act does not confer power upon the collector of customs to establish regular eight-hour tours of duty within a 44-hour week, comprising in whole or in part work after 5:00 p. m. on week days, or work on Sundays or holidays, without rendering the United States liable for the payment of overtime compensation on account of such regular duty.

(3) In holding that the United States was liable for overtime pay to customs inspectors even though the owner, agent or consignee of the vessel or conveyance involved had not requested or received a special license to lade or unlade at night, Sundays or holidays, and had not executed a bond to pay to the collector of customs the overtime compensation to be turned over to customs inspectors.

(4) In holding that an undertaking to reimburse the United States for overtime pay for

customs inspectors under the Act could be exacted from an international bridge or a vehicular tunnel company.

(5) In failing to give the United States credit, against the overtime compensation allowed on account of services rendered at night or on Sundays or holidays, for the regular base salary already paid to the inspectors on account of the same services.

(6) In failing specifically to find as a fact, that the collector of customs, in order to meet the requirements of continuous service necessitated by continuous international traffic at the port of Detroit, assigned customs inspectors to work daily eight-hour shifts within an established 44-hour week, that services rendered beyond such assigned tours of duty were performed by the customs inspectors at the request of the carrier under a special license from the collector, and that customs inspectors were reimbursed from funds paid to the collector by the carrier for such overtime work.[6]

(7) In entering judgments for the respondents.

REASONS FOR GRANTING THE WRIT

The Tariff Act of 1930 (Appendix, *infra*, pp. 23–24) provides that no merchandise, baggage or passengers arriving in the United States from a for-

[6] This point is not argued further in this petition, but the printed record contains the evidence in support of such a finding, and the Government desires to reserve the point for argument if certiorari is granted.

eign place shall be unladen from the carrying vessel or vehicle on Sundays or holidays or at night (5 p. m. to 8 a. m.) except under a special license granted by the collector (Sec. 450). Before such special license may be granted, the carrier must give bond to indemnify the United States against loss or liability from the granting of such license and to pay the compensation of customs officers and employees assigned to duty in connection with such unlading, in accordance with Section 5 of the Act of February 13, 1911, as amended (Sec. 451). Section 5 of that Act as amended in 1920 (Appendix, *infra*, pp. 21–22) requires the Secretary of the Treasury to "fix a reasonable rate of extra compensation for overtime services of inspectors * * * and other customs officers and employees who may be required to remain on duty" at night or on Sundays or holidays "to perform services in connection with the lading or unlading of cargo" or examination of passengers' baggage. Such rates are to be "fixed on the basis of one-half day's additional pay for each two hours * * * that the overtime extends beyond" 5 p. m. "and two additional days' pay for Sunday or holiday duty." The extra compensation must be paid to the collector of customs by "the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license" to unlade shall be granted, and the collector "shall pay the same to the several customs officers and employees entitled thereto according

to the rates fixed therefor by the Secretary of the Treasury." A proviso vests the collector "where customary working hours are other than" 8 a. m. to 5 p. m. "with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports."

The Court of Claims has interpreted these provisions as entitling customs inspectors at the port of Detroit to recover from the United States, in addition to their base pay, double overtime pay for such portion of their regular tour of duty as was performed at night or on Sundays or holidays, notwithstanding that such services were rendered during and as part of their regular shift of not more than eight hours per day or 44 hours per week, and notwithstanding that no such double compensation was ever demanded or received by the collector from the carrier. In so holding, the court below has decided a question of substantial general importance in a manner inconsistent with the language of the statutes, their legislative history and their long-standing administrative interpretation. Moreover, by according to respondents triple pay for services rendered in the course of regularly assigned tours of duty merely because they were performed between 5 p. m. and 8 a. m. or on Sundays and holidays, the court has conferred upon customs officers and employees a preferred pay status of a highly unusual character, which should not have been done unless predicated

upon statutory language clearly requiring such a result.

1. *The Act authorizes payment of overtime compensation only for services rendered in excess of the regular hours of duty.*—Section 5 of the 1911 Act as amended provides that "the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services" of customs officers and employees "who may be required to remain on duty" between 5 p. m. and 8 a. m. "or on Sundays or holidays." The term "overtime" in its usual and generally accepted sense means time over and above, or in addition to, the regular time normally devoted to the work.[1] And the clause "who may be required to *remain* on duty" is consistent with this usage in suggesting that the employee entitled to the extra compensation must have *remained* on duty after performing his regular services. The Court of Claims, however, rejected this construction and held that the statute in "plain and clear" terms entitled respondents to overtime pay for all work performed between 5 p. m. and 8 a. m., or on Sundays or holidays, even though that work was

[1] Webster's New International Dictionary defines "overtime" as "time beyond, or in excess of, a set limit; esp., extra working time." The term is plainly used in that sense in such kindred legislation as Section 7 of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, 1063, 29 U. S. C. 207) and Sections 1 (c) and 6 of the Walsh-Healey Public Contracts Act (c. 881, 49 Stat. 2036, 2038, 41 U. S. C. 35, 40).

within their regular eight-hour a day, 44-hour a week, tour of duty. The construction adopted below is contrary to the meaning which Congress intended the provision to have, as shown by the legislative history of the measure both before and after its adoption, and by its administrative construction.[10]

The debates on the floor of the House of Representatives between the manager of the 1920 bill and other Representatives show that the object of the bill was to reduce working hours of customs inspectors from 10 hours to 8 hours and to provide for overtime pay for hours worked in excess of that period. 59 Cong. Rec. 2171–3, 2176–8. This overtime pay system was thought preferable to employing additional men to work the odd hours, as a mean of providing for situations where the demands for odd-hour service was intermittent. *Ibid.*, p. 2171. At the Committee hearings, a representative of the Customs Inspectors' Association (the organization at whose request the bill was introduced) stated specifically that there would be no overtime and hence no extra compensation where inspectors were assigned to regular eight-hour shifts at night. Hearings before the House Subcommittee

[10] Even if the statutory language on its face can be deemed susceptible of the construction adopted by the court below, the difficulty of reconciling such interpretation with the normal meaning of the language renders it peculiarly appropriate to resort to extrinsic guides. Cf. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479.

of the Committee on Ways and Means on H. R. 6577, 66th Cong., 1st sess., pp. 9, 13. As the debates referred to above demonstrate, this view was unchallenged and was thought by the Congress which amended Section 5 in 1920 to be implicit in its provisions."

Moreover, the proviso with which Section 5 concludes was added for the express purpose of insuring that work within the eight-hour tour of duty but not performed between the hours of 8 a. m. to 5 p. m. would not be compensated as overtime. Congress' attention was called to the fact that in New Orleans the customary port hours were 7 to 4 instead of 8 to 5; and to avoid a possibility that the hour between 7 a. m. and 8 a. m. would be regarded as overtime the provision was added authorizing collectors of customs to regulate the

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" In 1921 and 1922, the Customs Inspectors' Association was required to defend this provision against attack of the transportation companies, who contended the overtime pay it allowed was excessive. The Association's representative repeatedly assured Congress that the provision authorized overtime pay only for work in excess of 48 hours a week, and that work at nights or on Sundays was not overtime if it was part of the regular 48-hour tour of duty. Hearings, Senate Committee on Commerce, S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 19, 26, 30, 31, 46, 130, 132, 136, 145. On the strength of these representations, Congress not only retained the provision but in the Tariff Act of 1922 extended it to types of transportation not theretofore affected by it. *Mallon* v. *M., St. P. & S. S. M. Ry.*, 11 F. (2d) 332 (App. D. C.), certiorari denied, 271 U. S. 678. Congress was similarly advised while considering the Tariff Act of 1930 (Senate Committee Hearings on Tariff Act of 1930, 71st Cong., 1st sess., p. 494) and retained the provision intact.

hours of customs employees to conform to the prevailing working hours of ports where they differed from those referred to in the bill. 59 Cong. Rec. 2172, 2173, 2177, 2178. The proviso was framed generally, so it authorizes the collectors to fix regular tours of duty of eight hours a day, six days a week, at any period of the day or week where necessary to conform to peculiar local conditions. It was so interpreted by the representative of the Customs Inspectors' Association in his testimony before Congress in 1922 (Hearings, Senate Committee on Commerce, S. 1504, S. 1774 and S. 2188, 67th Cong., 1st and 2nd sess., p. 130), and in 1930 (Hearings before Senate Committee on Tariff Act of 1930, *supra*, p. 494).[12]

The long-standing administrative interpretation is to the same effect. At least since 1900, antedating the enactment of Section 5, continuous 24-hour customs inspection service has been maintained at some border stations; the inspectors working on separate shifts of equal periods. See *International Railway Co.* v. *Davidson*, 257 U. S. 506, 508. The administrative construction of Sec-

[12] Apparently it was similarly interpreted by Congress when, in prescribing regular tours of duty in the Customs Administrative Act of 1938 (c. 679, 52 Stat. 1082), it added (Section 451) that nothing in the Act was intended "to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at night or on Sundays or holidays when such assignments are in the public interest."

tion 5 has been that inspectors on such shifts at night, or on Sundays or holidays, are entitled to overtime only for work in excess of 44 hours (48 hours prior to 1931) per week. See letter from Commissioner of Customs, Appendix, *infra*, pp. 25–26. See also the testimony of the representative of the Custom Inspectors' Association before Congress in 1920, 1921, 1922 and 1930, referred to above, which abundantly demonstrates that customs inspectors' pay was actually computed on that basis in the years mentioned. This administrative construction should not have been disregarded. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 525.[1]

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[1] 2 Comp. Gen. 512 (1923), accord; to same effect: 10 Comp. Gen. 487 (1931), under the similar Act of March 2, 1931, c. 368, 46 Stat. 1467, (8 U. S. C., 109a), relating to immigration inspectors' compensation.

[2] The court below relied for its construction of the term "overtime," upon *Ferguson* v. *Port Huron & Sarnia Ferry Co.*, 13 F. (2d) 489, 492 (E. D. Mich.). Although the language in the opinion in that case suggests support of the view espoused by the Court of Claims, the record in the *Ferguson* case discloses that the Collector of Customs was suing to recover from the carrier extra compensation for services rendered on Sundays and holidays, in addition to the regular tour of duty of 48 hours a week which then obtained. See also Hearings before the Senate Committee on Commerce, 67th Cong., 1st and 2d sess., *supra*, pp. 28, 130. In *Mellon* v. *M., St. P. & S. S. M. Ry.*, 11 F. (2d) 332 (App. D. C.), certiorari denied, 271 U. S. 673, injunctive relief was unsuccessfully sought against the Government to prevent it from requiring a special license and exacting a bond of the plaintiff carrier for "the extra compensation to be paid customs officers and inspectors for their overtime services." Brief for

2. *Even if respondents' regular services at night or on Sundays or holidays constitute "overtime", the court below improperly awarded respondents thrice instead of double their base pay for a regularly assigned eight-hour tour of duty.*—Respondents received a base pay of $2,100 annually for performing their regular tour of duty not exceeding eight hours per day and 44 hours per week. The Court of Claims rejected the Government's contention that at least it is entitled to have the base pay received by respondents credited against the extra compensation awarded as overtime. The result was a judgment which, when added to the compensation already paid to respondents, awarded them pay at more than three times the base rate for a regular 44-hour weekly tour of duty.[15] Such a result violates common sense and rejects the logical results of the court's own construction of the statute. For if customs inspectors are entitled

United States, in Opposition, No. 1155, October Term, 1925, p. 5. It is clear that it was for actual overtime beyond the 48-hour week that the Government was seeking to obtain the carrier's bond, and not merely for services rendered as part of a regular tour of duty. Hearings, Senate Committe on Commerce, S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 30-32.

[15] The extra compensation awarded for the "overtime" services is somewhat more than double the base pay. See Findings 8-12. The discrepancy may be accounted for by the fact that under Section 5 the rate of overtime compensation is "one-half day's additional pay for each two hours or fraction thereof of at least one hour" beyond 5:00 p. m. See Appendix, p. 21, *infra*.

to overtime rates for services performed between 5:00 p. m. and 8:00 a. m. and on Sundays and holidays, the rates provided in the Act would obviously supersede the statutory base salary. The base salary having already been paid for such services, the United States is entitled to credit in the amount thereof against the statutory double compensation awarded to respondents. The denial of such credit in effect authorizes the receipt of triple pay for the performance of a regular tour of duty, a result which Congress could hardly have intended, particularly in the light of the overtime rates effective in other branches of Government service.[16]

3. *The judgment below was improper in respect of customs services performed at a bridge or tunnel.*

(a) This Court in *International Railway Co.* v. *Davidson*, 257 U. S. 506, held that Section 5 of the 1911 Act as amended prior to the Tariff Acts of 1922 and 1930 did not apply to customs services rendered on an international bridge, since it is not a "vessel and other conveyance." Nothing in those acts has broadened the scope of Section 5 sufficiently to apply it to services on a bridge or tunnel, for they forbid the unlading of merchan-

[16] Compare Act of May 24, 1928, c. 725, 45 Stat. 725, as amended (39 U. S. C. 828), which allows a 10% increase in pay for certain postal employees for night service; Fair Labor Standards Act and Walsh-Healey Public Contracts Act, under which 1½ times the base pay is fixed for overtime.

dise, baggage and passengers from a "vessel or vehicle" without a special permit, require that application for such permit be made by the owner or agent of the "vessel or vehicle" involved, and apply the provisions of Section 5 to overtime in such unlading. As Judge Madden pointed out in his dissenting opinion below, a bridge or tunnel is not a "vessel or vehicle" and hence is not required to obtain a special license to operate at night or on Sundays and holidays. To apply the overtime provisions of Section 5 to services on such structures would require either that the owner of the tunnel or bridge obtain a special license and give bond for the inspection or unlading of merchandise in which it has no interest as carrier or consignee, or else that license and bond be required of every vehicle or pedestrian using the bridge or tunnel. Such an absurd requirement should not lightly be attributed to the Congress.

(b) Section 5 of the 1911 Act provides that "the said extra compensation shall be paid [to the collector] by the master, owner, agent, or consignee" of the vessel or other conveyance for whose lading or unlading at night or on Sundays or holidays a special license has been issued, and the collector is required to pay such compensation "to the several customs officers and employees entitled thereto." The legislative history of the Act bears out the clear intention that the excess cost for overtime work should be borne

not by the United States but solely by the person benefited, who makes use of the inspection facilities at unusual hours. House Committee on Ways and Means, Hearings on H. R. 9525, 61st Cong., 2d Sess., pp. 462, 463, 464, 470; House Rept. 1657, 61st Cong., 2d Sess.; House Committee on Ways and Means, Hearings on H. R. 6577, 66th Cong., 1st Sess., pp. 9, 13, 18; 59 Cong. Rec. 640; Senate Committee on Commerce, Hearings on S. 1504, S. 1774, S. 2188, 67th Cong., 1st and 2d Sess.; Senate Hearings on H. R. 2667, Tariff Act of 1930, p. 494. The liability to pay the extra compensation arises only when a special license to lade or unlade has been issued to a carrier who has filed bond to pay such costs. The court found that six of the carriers, those operating by tunnel or ferry, had obtained special licenses and filed bonds covering the excess pay, and it was from these six that collections of extra compensation had been received by the collector and turned over to respondents for services in excess of their 44-hour week. No such special license, however, was requested or obtained by either the bridge or the vehicular tunnel to unlade at night or on Sundays and holidays, and neither had posted a bond to reimburse the United States for any excess cost. The judgment below would compel the United States to pay the excess costs of inspection under legislation which Congress believed did not impose such a liability upon the United States.

4. *The decision below is of substantial general importance.*—The statute involved herein is substantially the same in wording as the Act of March 2, 1931, c. 368, 46 Stat. 1467 (8 U. S. C. 109a), extending overtime compensation to immigration inspectors, the Act of May 11, 1938, c. 194, 52 Stat. 345 (46 U. S. C. 382b), extending overtime compensation to local inspectors, shipping commissioners, their deputies and assistants, and customs office employees, and the Act of March 23, 1941, c. 24, 55 Stat. 46 (47 U. S. C. Supp I, 154 (f) (2)), extending overtime compensation to field inspectors of the Engineering Department of the Federal Communications Commission. Presumably the decision below would be authoritative in the Court of Claims under all these acts, if allowed to stand. Moreover, the decision will undoubtedly precipitate a considerable amount of litigation not only under the statute herein but also under these related acts, and we are advised that the total potential recovery against the United States merely with respect to the present statute would be approximately $8,000,000.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JULY 1943.

APPENDIX

Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920, c. 61, 41 Stat. 402 (19 U. S. C. 267), provides:

> SEC. 5: That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at

night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Sections 401, 450 and 451 of the Tariff Act of 1930, c. 497, Title IV, 46 Stat. 708, 715 (19 U. S. C. 1401, 1450, 1451) provide in part as follows:

SEC. 401. MISCELLANEOUS.

When used in this title or in Part I of Title III—

(a) *Vessel.*—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) *Vehicle.*—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

(c) *Merchandise.*—The word "merchandise" means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited.

(d) *Person.*—The word "person" includes partnerships, associations, and corporations.

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(f) *Day.*—The word "day" means the time from eight o'clock antemeridian to five o'clock postmeridian.

(g) *Night.*—The word "night" means the time from five o'clock postmeridian to eight o'clock antemeridian.

SEC. 450. UNLOADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe.

SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum

to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled "An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and

employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday.

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TREASURY DEPARTMENT
BUREAU OF CUSTOMS
WASHINGTON

Seal
Office of the Commissioner

Address reply to
Commissioner of Customs

JUNE 4, 1943.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

Attention: Mr. Paul Sweeney

SIR: In connection with the case of *Howard C. Myers* v. *The United States*, in which the Court of Claims has held that customs officers and employees are entitled to overtime compensation under section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (U. S. C. title 19, sec. 267), for services performed at night or on Sundays or holidays on regular tours of duty, representatives of your Department have requested further information from this Bureau as to (1) whether it has ever been the practice at any of the ports to pay overtime compensation for services performed on regular tours of duty, and (2) whether or not, up to the time of the institution of suit in the *Myers* case, the practice of assigning customs employees to regular tours of duty at night

and on Sundays and holidays was in effect at seaports as well as border ports.

It has never been the practice of the Customs Service to pay or collect from parties in interest overtime compensation under the above-mentioned Act for services performed during the regular tours of duty of officers or employees. It has been the practice throughout the country to collect and pay overtime compensation only for services in addition to the 44 hours or 48 hours per week required of the officers or employees for earning their regular pay.

At all times prior to the institution of the suit in the *Myers* case, and until recently when some regular tours of duty have been established because of the war, the practice of assigning customs officers and employees to regular tours of duty at night or on Sundays or holidays for the performance of services within the purview of the above-mentioned Act was not in effect at the seaports but was limited to the ports on the Canadian and Mexican borders where, because of continuous travel, such assignments were in the public interest.

Very truly yours,

[S.] W. R. JOHNSON,
Commissioner of Customs.